IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

C-482 No. 876/ 2001
(Old No. 1263/1995)

Anwar & other
Vs.
Satish Chandra & another

Date of decision:- 16.7.05

A.F.R. (Approved for Reporting)

Not approved for reporting

Initials of Judge

Date:- 16.7.2005

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Appl. No. 876 of 2001
(Old No. 1263 of 1995)

1. Anwar S/o Sri Ali Hasan
2. Jilal Hasan S/o Sri Ali Hasan
3. Sabbir Hasan S/o Sri Ali Hasan
4. Ali Hasan S/o Sri Noor Mohammad
   All R/o village Ajabpur Kalan
   Thana Dalanwala
   District Dehradun .....Applicants

Versus

1. Sri Satish Chandra Badola
   S/o Sri Chandra Mohan Badola
   R/o 10 Dobhalwala
   Thana Kotwali
   District Dehradun.
2. Addl. C.J.M. – III
   Dehradun .....Respondents

Date:- 16th July, 2005

Hon'ble J.C.S. Rawat, J.

1. Heard Sri Kuldeep Rawal i/b for Sri Lokendra Dobhal learned counsel for the applicants and Sri Yogesh Pandey and Sri Arvind Vashisth learned counsel for the respondent no. 1.

2. The petition under section 482 Cr.P.C. was filed for quashing the proceedings arising out of complaint case No. 162/1994 pending in the court of Addl. Chief Judicial Magistrate, Dehradun {Satish Chandra Badola Vs. Anwar and others} under section 120-B, 420 I.P.C.

3. The factual position in a nutshell is that the respondent No. 1- Satish Chandra Badola filed a complaint before the Addl. Chief Judicial Magistrate, Dehradun against the applicants under section 120-B, 420, 467, 468, 471 IPC, wherein it has been alleged that on 4.4.1989 the applicant No. 1 to 3 came at the residence of the complainant and offered to sell out their land, measuring $10^{1/2}$ Bigha situated at Kedarpur

Pargana, Kendriya Doon, District Dehradun {bearing plot nos. 52, 55, 56 & 57}. It has also alleged that initially the complainant was not aware that the applicants are the co-owners of the property in dispute. After due deliberations and negotiations, the matter was finalized and an agreement was executed to sell the aforesaid property in the office of Sub-Registrar, Dehradun in favour of the complainant. The complainant gave a sum of Rs. One lakh to the applicants as a token of advance. It was agreed between the parties that the final sale deed would be executed on 4.4.1990, which could be extended by mutual consent. Thereafter, it has been alleged in the complaint that the time was extended till Sept. 1990 and another amount of Rs. 30,000/- was paid by the complainant. A total sum of Rs. 1,70,500/- was received by the applicants from the complainant- respondent No.1. On one pretext or the other the applicants refused to execute the sale seed in favour of the complainant. Thereafter, the matter was investigated and the Magistrate framed the charges against the applicants-accused under section 120-B, 420 I.P.C. Feeling aggrieved by this, the present petition has been preferred.

4. The learned counsel for the applicants contended that the dispute between the applicants and the complainant-respondent No.1 was purely of a civil nature arising out of contractual relationship with regard to commercial transaction. Even looking to the sworn statements and the notice, no case is made out to proceed against the applicants on the criminal side. The learned counsel for the respondent No.1 refuted the contention and contended that the respondent No.1 came to know later on that the applicants were not the

Absolute owner of the property in dispute. The applicants were the co-owners of the property. It was further contended that the respondent No. 1 had ably proved before the court below that there is sufficient evidence against the applicants and the applicants had intention to cheat him. As such, the applications had executed the agreement.

5. The learned counsel for the applicants further contended that the respondent No.1 has not paid the residuary amount of the agreement and as such the applicants did not perform their part. Therefore, the applicants are not liable for the criminal proceedings.

6. Before examining the respective contentions of the parties, I would like to discuss the legal position in this regard. Every breach of trust may not result in a penal offence of breach of trust unless there is evidence of mental act of fraudulent misappropriation. An act of breach of trust involves a civil law in respect of which the person wrongs may seek his redressal for damages in civil court, but a breach of trust with mens rea, gives a right to criminal prosecution as well.

7. In order to constitute an offence of cheating the essential ingredients are:-

(i) There should be fraudulent or dishonest inducement of a person by deceiving him.

(ii) The person so deceived should be entrusted to deliver any property to any person or to consent that any person shall retain any property or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he

were not so deceived,(iii) In cases covered by the said act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheating".

8. In determining the question, it has to be kept in mind that distinction between mere breach of contract and the offence of cheating is a very fine one. It depends upon the intention of the accused at the time of the inducement, which may be judged by the subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give right to the criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. That is the time when the offence is said to have been committed. Therefore, it is the intention or mens rea, which is the gist of the offence to hold a person guilty of cheating at the time of making the promise. From his mere failure to keep a promise subsequently such an intention at the beginning that is when he made the promise cannot be presumed. In the present case it is evident that the applicants-accused are the co-owners of the property. It is admitted that an agreement was executed by the applicants in favour of the complainant and a sum of Rs. One lakh was given at the time of agreement to the applicants. It is also on record that the parties entered into an agreement to sell $10^{1/2}$ bighas of land situated in Mauja Kedarpur, Pargana Central Dehradun, District Dehradun and the property in dispute was agreed to be sold to the proposed vendees @ Rs. 85,000/- per bigha. Meaning thereby, the sale consideration was about Rs.9 lakh. Only a sum of Rs.1,70,000/- has been paid by the

Respondent No. 1 and there is nothing on record which shows that the agreement was filed before the court below. As such, it is also on record that the agreement is subsisting in between the parties. Moreover, the complainant had already filed a civil suit for the recovery of money against the applicants. The respondent No.1 has made vague and false allegations with regard to the conspiracy. From the material that was placed before the court below even prima-facie it cannot be said that there was any conspiracy or there was any intention on the part of the applicants. If the applicants have committed any breach of agreement it is open to the complainant to seek redressal in the competent court of forum to recover the damages if permissible in law in case he has sustained any loss. In order to constitute an offence of cheating the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise to show that he had committed an act of cheating. Looking to the complaint and other relevant documents and the grievance made by the complainant and having regard to the agreement it is clear that the dispute and grievance has arisen out of the agreement. As such, I find that this is purely a case of civil nature and there is no mens rea on the part of the applicants.

9. In view of the foregoing discussions, I find that the proceeding arising out of complaint case No.162/1994 pending before the Addl. Chief Judicial Magistrate, Dehradun is liable to be quashed and the petition is liable to be allowed.

10. The petition is allowed and the proceedings arising out of complaint case No. 162/1994 pending before the Addl. Chief Judicial Magistrate, Dehradun are quashed.

(J.C.S. Rawat, J.)

Dated 16.7.2005
LSR